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In the Supreme Court of the United States

OCTOBER TERM, 1960

WILLIAM F. BANDLOW AND KARL SORENSON,
PETITIONERS

v.

STUART ROTHMAN, ET AL., INDIVIDUALLY AND AS GENERAL COUNSEL, CHAIRMAN AND MEMBERS RESPECTIVELY OF AND CONSTITUTING THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 444

WILLIAM F. BANDLOW AND KARL SORENSON,
PETITIONERS

v.

STUART ROTHMAN, ET AL., INDIVIDUALLY AND AS GENERAL COUNSEL, CHAIRMAN AND MEMBERS RESPECTIVELY OF AND CONSTITUTING THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the district court dismissing the complaint is set forth at J.A. 93.[1] The opinion of the court below (Pet. 1a-2a), affirming the district court's order, is reported at 278 F. 2d 866.

[1] "J.A." refers to the portions of the record printed as a joint appendix to the briefs in the court below.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1960 (Pet. 2a). A petition for rehearing *en banc* was denied on June 29, 1960 (Pet. 7a). The petition for a writ of certiorari was filed on September 27, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court lacked power to review and set aside the determination of the General Counsel of the National Labor Relations Board not to issue an unfair labor practice complaint on the charges filed by petitioners.

STATUTES INVOLVED

In addition to the statutory provisions set forth at pp. 3-6 of the Petition, the relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 10. * * *

> (b) Whenever it is charged that any person has engaged in or is engaging in any * * * unfair labor partice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint * * *.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief of restraining order, as provided in section 2112 of Title 28 * * *.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. * * *

STATEMENT

Petitioners are employees of the Allen Bradley Company in Milwaukee, Wisconsin, and members of Local 78, Tool and Die Makers Lodge of the International Association of Machinists (J.A. 3). In September 1956, the Union called a strike over contract terms, and established picket lines at the Company's plant. When petitioners declined to participate in the strike, the Union fined them, and there-

after brought suit in the state court to enforce the fines (J.A. 4-5, 6-7).

Plaintiffs filed charges with the Regional Director of the Board alleging that the Union's reprisals against them constituted restraint and coercion in violation of Section 8(b)(1)(A) of the Act. The Regional Director, after investigation of the charges, declined to issue complaints thereon (J.A. 5-6, 7-8). This action was appealed to the General Counsel of the Board, who sustained the Regional Director. The General Counsel explained the basis of his decision as follows (J.A. 29):

> Although Section 7 of the Act gives an employee an opportunity to join or refrain from joining in union activity, the proviso to 8(b)(1)(A) allows the Union to prescribe its own rules with respect to acquisition or retention of membership therein. In this connection the Board . . . has held that "The imposition of a fine on a union member is considered an internal affair within the meaning of the proviso." (See *Minneapolis Star and Tribune Co.*, 109 NLRB 727 at 729.) In view of this and, particularly, since there was no substantial evidence that the action taken by the Union caused or was intended to cause the Company to discriminate against the charging parties and no showing that their tenure of employment had been affected in any manner, the General Counsel concluded that a violation of the Act had not been established.

Petitioners thereupon brought suit in the District Court for the District of Columbia, requesting that the General Counsel of the Board be required to issue

complaints based on their charges, and that a declaratory judgment be made that the Act prohibits the levying and enforcement of fines by labor unions against their members for an exercise of their right to refrain from participating in strike action (J.A. 2-17). After hearing, the district court dismissed the complaint on the grounds that it lacked jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief could be granted (J.A. 93). The court of appeals, in a *per curiam* opinion (Pet. 1a-2a), affirmed the district court's order. Quoting from its earlier decision in *Hourihan* v. *National Labor Relations Board*, 201 F. 2d 187, certiorari denied, 345 U.S. 930, which involved a similar proceeding, the court stated that the district court " 'has no power to order the General Counsel to issue a complaint and no power to require the Board to issue an order in a matter which is not before the Board' " (Pet. 1a-2a).[2]

ARGUMENT

The decision below is correct, and no conflict of decisions is shown. No issue warranting review by this Court is presented.

1. Section 10(b) of the Act vests the Board or its agent with broad discretionary power with respect to the issuance of unfair labor practice complaints.

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[2] In its original opinion, the court had added: "This is still true if, as appellants allege, the General Counsel has misconstrued the statute." The court subsequently deleted this sentence (Pet. 2a).

See *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18. Section 3(d) confers this power upon the General Counsel of the Board, providing that he shall have "final authority on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10 and in respect of the prosecution of such complaints before the Board." The Act, although it provides for review in the courts of appeals of final Board orders entered in unfair labor practice proceedings (Section 10(e) and (f)), makes no provision for review of the General Counsel's threshold determination of whether an unfair labor practice proceeding should be initiated.

The congressional intent to preclude judicial review of the General Counsel's decisions respecting the issuance of unfair labor practice complaints is not only clear from the language of the statute, but also from Congress' visualization of the General Counsel's role as analogous to that of a district attorney in deciding whether to institute a prosecution.[3] Accordingly, whether instituted in the district court, as here, or in the court of appeals, suits to obtain review of the General Counsel's decision not to issue an unfair labor practice complaint have consistently been dismissed for lack of jurisdiction over the subject matter. *Hourihan* v. *National Labor Relations Board*, 201 F.

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[3] See Senator Taft's statement at 93 Cong. Rec. 6859, 2 Legislative History of the Labor Management Relations Act, 1947 (G.P.O., 1948), 1622-1623; cf. *Confiscation Cases*, 7 Wall. 454, 458-459.

2d 187, certiorari denied, 345 U.S. 930; *Anthony* v. *National Labor Relations Board*, 204 F. 2d 832, 834 (C.A. 6); *Manhattan Construction Co.* v. *National Labor Relations Board*, 198 F. 2d 320 (C.A. 10); *General Drivers, Inc.* v. *National Labor Relations Board*, 179 F. 2d 492, 494-495 (C.A. 10); *Lincourt* v. *National Labor Relations Board*, 170 F. 2d 306, 307 (C.A. 1).

2. The fact that the unfair labor practice charges here involved a question of statutory interpretation, rather than an evaluation of evidence, does not, as petitioners contend (Pet. 10-14), require a different conclusion. If, as we have shown, Congress has not given the courts supervisory or review authority over the General Counsel's determinations respecting the issuance of complaints, the character of the question presented by the charge cannot alter the result. In any event, mandamus or its equivalent would not lie to overturn the General Counsel's determination in this case, even if it were reviewable, for the statutory problem presented is not one in which "the agency is clearly derelict in failing to act," but rather one in which "the very construction of the statute is a distinct and profound exercise of discretion." *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318.

Although Section 8(b)(1)(A) bars a union from restraining or coercing an employee in the exercise of his Section 7 rights, it does not "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein". A problem is consequently pre-

sented as to how to reconcile these competing objectives. The resolution made by the Board, which is supported by the legislative history,[4] is that unions may seek to enforce union rules or policies by fines or any other means, so long as no attempt is made to affect the non-conforming member's employment status. *Minneapolis Star and Tribune Co.*, 109 NLRB 727, 728.[5] The General Counsel properly applied this principle here. The obligation to join in strike activity was required by a union membership rule applicable to petitioners, and, since there was no evidence of any attempt to enforce that rule by obtaining petitioners' discharge, the action taken by the Union remained within the area of internal union policy and hence was not barred by Section 8(b)(1)(A) as construed by the Board.

3. Petitioners' reliance on the Administrative Procedure Act, the Declaratory Judgment Act, and the general equity powers of the district court (Pet. 4-6, 15-16) to establish jurisdiction in this case is un-

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[4] See 93 Cong. Rec. 4193, 4433, 2 Legislative History, 1097, 1200. See also *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 40-41.

[5] See, also, *Local 248, UAW* v. *Wisconsin Board*, 46 LRRM 3056 (Wis.S.Ct., October 4, 1960). Contrary to petitioners' suggestion (Pet. 12-13), the Board's decision in *Minneapolis Star* does not represent an abberation. The other Board cases cited by petitioners are distinguishable from the situation here, for they involve either violence or threats thereof, or situations in which the union enforced its policy by procuring the employee's discharge. Similarly inapposite is *National Labor Relations Board* v. *Local Union No. 639*, 362 U.S. 274 (Pet. 13), which involved the question of whether Section 8(b)(1)(A) barred peaceful picketing for recognition by a minority union.

availing. None of these statutory provisions confers jurisdiction where, as in the present case, the regulatory statute in question has precluded jurisdiction. See *Schilling* v. *Rogers*, 363 U.S. 666; *Skelly Oil Co.* v. *Phillips Co.*, 339 U.S. 667, 671; *Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540, 545.

Nor are petitioners aided by *Leedom* v. *Kyne*, 358 U.S. 184 (Pet. 15). That case, unlike the instant one, involved a decision by the Board which was reached after formal hearing and which finally determined "legal rights and relationships" (*LaCrosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U.S. 18, 24). The inference that Congress intended to preclude judicial review of such a determination cannot as readily be drawn as it can with respect to a prosecutor's determination not to institute proceedings at all. Moreover, there, unlike here, it was clear to the Court that the Board action had violated the express terms of the statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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